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In The
Supreme Court of the United States
October Term, 1985

MICHAEL BOWERS,
Attorney General of Georgia,

Petitioner,

v.

MICHAEL HARDWICK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE FOR LESBIAN RIGHTS PROJECT, WOMEN'S LEGAL DEFENSE FUND, EQUAL RIGHTS ADVOCATES, INC., WOMEN'S LAW PROJECT, and NATIONAL WOMEN'S LAW CENTER

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INTEREST AND DESCRIPTION OF AMICI CURIAE

This brief *amicus curiae* in support of respondents is submitted on behalf of the Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., Women's Law Project and National Women's Law Center.*

The Lesbian Rights Project is a public interest law firm doing impact litigation and providing no-fee legal services for lesbians and gay men who encounter discrimination on the basis of sexual orientation. Founded in 1977, the Lesbian Rights Project is the only legal organization in the country which emphasizes litigation and public education in areas of law of special concern to lesbians, including the right of a parent to child custody and visitation without reference to the parent's sexual orientation, equal access for lesbians and gay men to adoption and foster parenting, the right of non-marital partners to speak for each other in the event of incapacity or illness, and the right of non-marital partners to equal employment benefits. The Project also does legal work in the area of employment discrimination, insurance discrimination, access to public accommodations, discrimination in the military, and decriminalization of private consensual sexual behavior.

Women's Legal Defense Fund (WLDF) is a private non-profit membership organization located in Washington, D.C. It was founded in 1971 to assist women in their efforts to achieve equality under the law. WLDF is dedicated to eliminate sex discrimination and sex stereotypes, and believes that discrimination against lesbians and gay men is intricately connected to discrimination against women in our society. WLDF further believes that the right to control over one's body, which encompasses matters of

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* Letters from counsel for all parties consenting to the filing of this brief are being filed with the Clerk.

reproduction and sexuality, is critical to the achievement of equality between the sexes.

Equal Rights Advocates, Inc. is a San Francisco-based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the workforce because economic independence is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through ERA, Inc.'s participation, both as counsel and as *amicus*, in numerous employment discrimination cases.

The Women's Law Project is a non-profit feminist law firm which seeks to advance the legal status of women through litigation, public education, and individual counseling. During the past eleven years its activities have included work in the fields of health, reproductive freedom, employment, domestic relations, housing, insurance, credit, education, and constitutional privacy. Women's Law Project has become a unique resource for the women of Philadelphia and Pennsylvania, as well as an organization recognized nationally for its expertise and commitment in the field of women's rights.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose of protecting and advancing women's rights. The Center represents women's concerns before federal administrative agencies and courts. The Center has been involved in issues affecting the employment rights of women, and in particular has handled cases involving employment of women in nontraditional jobs.

Amici curiae assert that the continued criminalization of private consensual adult sexual behavior is of grave

concern, not only to lesbians and gay men, but to all women and men who value the right of the individual to intimate self-expression and personal autonomy.

SUMMARY OF ARGUMENT

Amici curiae Lesbian Rights Project et al. contend that the right of privacy, as derived from the U.S. Constitution and Bill of Rights, readily and reasonably includes the right of an adult person of whatever sexual orientation (to wit., whether heterosexual, bisexual, gay or lesbian) to choose to engage in physically private, consenting, non-violent sexual activities with another adult person. *Amici* believe that the privacy decisions of this Court, from the earliest to the most recent, support the position that it is within the fundamental rights of the individual person to make such intimate personal choices as are not only proscribed but criminalized by the "anti-sodomy" law of the State of Georgia. *Amici* for respondents assert that the need for love is natural, and that the determination to express and receive love of a sexual nature by engaging in sexual activities with another adult of the same gender is one possible type of behavior within the range of medical and psychological normalcy.

Amici for respondents further contend that government will suffer a loss of respect if the U.S. Constitution is read to undercut the claim of the individual to a right to privacy in the circumstances at bar. Not only will the state be invited to police the sacred precincts of bedrooms, marital and non-marital alike, thus denigrating the role and relationship of law enforcement to the individual citizen, but governments such as that which adopted the "anti-sodomy" law as issue in the case at bar, will be lent the imprimatur of this Court in enacting homophobic laws and

enforcing discrimination based on sexual orientation on an open, *de jure* basis. This Court and this nation should have learned to recognize the irrationality and wastefulness of such discrimination, from the lesson of this Court's own decisions, which first validated, and since have had to repair, the harms done by *de jure* discrimination against women and people of color. Responsibility, and the privacy that is designed to enforce and protect it against unwarranted governmental interference, must be held to rest with the individual for his/her private, consenting, adult sexual activities, where no violence, coercion or threat of unwanted public exposure is present.

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ARGUMENT

INTRODUCTION

For tens of millions of adult persons in the United States, this case concerns the relationship between the boundaries of government and the boundaries of the human self. For this Court and this legal system, this case concerns the constitutionality not simply of one state's "anti-sodomy" law but of the exercise of state power to criminalize those tens of millions of adults in the United States.

It would be impossible accurately to determine the number of adult persons in the United States who have engaged in or are likely in the future to engage in sexual activities that would violate a law prohibiting all oral-genital and anal-genital contacts. Indeed, it is impossible precisely because of the "privacy" in which people tend to hold this type of sexual information about themselves. Law itself upholds the reasonableness of the person's expectation that his/her sexual acts, if conducted with the consent of the participants, in physical privacy, between

adults will not be the subject of inquiry, intrusion or action by anyone else, including government.[1] While it is possible to imagine a government that would set about inquiring about and cataloguing sexual activities among its subjects, surely transplanting that imagined possibility to the shores and mountains and cities of the United States would chill the hearts of the vast majority of subjects of this government.[2]

In spite of the impracticability of statistical assessment of the commonness of the sexual practices criminal-

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[1] In the context of civil enforcement of the human person's federal constitutional right to privacy, this expectation has been upheld. *See*, e.g., *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1977) (city employer's questions to police officer concerning his sex life, and specifically his relationship to a recently emancipated female with whom he was living were held to violate his federal constitutional right to privacy); *Mindel v. U.S. Civil Service Commission*, 312 F.Supp. 485, 487 (N.D. Cal. 1970) (plaintiff public employee's right to privacy and to due process were held to have been violated where his employer, U.S. Postal Service, deprived him of his employment based upon the "immorality" of his living with a female not married to him; District Court agreed with plaintiff that "[t]he spectre of the government dashing about investigating this non-notorious and not uncommon relationship . . . is the most disturbing aspect of this case"); cf. *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (public employer's questions to female police officer candidate concerning her lawful sex life were held to violate employee's right to freedom from discrimination under Title VII of the Civil Rights Act of 1964, as amended).

[2] For example, in Nazi Germany, the Nuremberg Laws, passed in 1935, outlawed both marriage and extramartial sexual relations between Jews and non-Jews. W. Shirer, *The Nightmare Years: 1930-1940* 159 (1984). The end result of the Nazi system of inquiry into and cataloguing of sexual activities included torture and executions of those deemed to be sexually aberrant. "By 1945 there were more than a thousand concentration camps in Germany, Austria and occupied countries. Besides Jews, who constituted the vast majority of those killed, the approximately seven million people killed included . . . homosexuals. Their unspeakable agony was exacerbated by the infamous medical experiments. . . ." M. Daly, *Gyn/Ecology:* The Mataethics of Radical Feminism 300 (1978).

ized by the Georgia statute here at issue, it seems reasonable to project, based on available data, that oral-genital and anal-genital modes of sexual expression are commonly engaged in by tens of millions of gay, lesbian, bisexual and heterosexual adult persons in the United States.[3] Assuming as the data suggest that gay, lesbian and bisexual persons constitute a minority numbering around twenty million persons in the U.S.,[4] the overwhelming majority of persons engaging in sexual activities that would violate Georgia's law, then, are persons of heterosexual orientation.

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[3] *See, e.g.*, A. Kinsey, *et al. Sexual Behavior in the Human Female* 281 (1953) (50% of female respondents had been orally stimulated by male partners; approximately 40% of female respondents had orally stimulated their male partners); A. Kinsey, *et al., Sexual Behavior in the Human Male* 371 (1948) (60% of male respondents had engaged in oral-genital contact, either heterosexual or homosexual); S. Hite, *The Hite Report: A Nationwide Study of Female Sexuality* 232 (1976) (97% of female respondents had been orally stimulated by a partner); S. Hite, *The Hite Report on Male Sexuality* 1110, 1121 (1981) (approximately 95% of male respondents had been orally stimulated by a partner; approximately 96% of all respondents had orally stimulated a female partner); C. Tarvis and S. Sadd, *The Redbook Report on Female Sexuality* 162, 163 (1977) (91% of the women had performed fellatio with their husbands; 42% of the women had engaged in anal intercourse with their husbands); L. Wolfe, *The Cosmo Report* 312 (1981) (84% of female respondents engage regularly in fellatio with male partners; 13% engage regularly in anal sex with male partners).

[4] "There are some 20 million lesbians and gay men living in the United States today. These men and women represent a community that is as diverse as American society. There are gay people in every economic class, racial group, religious organization, and occupation." D. Hitchens, Foreward to H. Curry & D. Clifford, *A Legal Guide for Lesbian and Gay Couples* (2d ed. 1984). According to one past president of the American Psychiatric Association, "It is fair to conclude, conservatively, that the incidence of more or less exclusively homosexual behavior in Western culture ranges from 5 to 10 percent for adult males and from 3 to 5 percent for adult females. If bisexual behavior is included, the incidence may well be twice these figures." J. Marmor, *Homosexual Behavior: A Modern Reappraisal* 7 (1980).

For all of these tens of millions of persons, regardless of sexual orientation, this case involves an issue of the most vital and fundamental nature. The issue is whether a state is free, under the U.S. Constitution, to criminalize sexual activities engaged in by them as consenting adults, in physically private locations, because of the gender(s) of the partners involved and/or because of the specific parts of the body used. The potency of the criminal sanction is self-evident, and need not be belabored in this forum. What is at stake in the case at bar is nothing more or less than the capacity of states to render millions of their citizens subject to the consequences of criminality, including prosecution, trial, sentence/penalty and lifelong stigmatization and suffering that can accompany conviction for crimes.

In a very real and profound sense, this case concerns a highly essential question to be asked about the relationship between the person and his/her government. That question is: what is the proper basis for limiting the prerogatives of the latter to govern the former? This issue, which has absorbed sentient beings including hundreds of accomplished philosophers for centuries, is to be answered as it applies to the case at bar by resort to a body of legal precedent interpreting the U.S. Constitution, and to the theories of the members of this Court as to the meanings of those precedents.

Regardless of the particular positions and beliefs of the members of this Court relative to this case, there is one view that *amici* urge should be universal among the decision-makers: this case must not be trivialized, whether because it arises in relation to the subject of sex, or because petitioner asserts that it concerns the right to "commit homosexual sodomy", or because the respondent Hardwick represents an oft-despised and heavily stereotyped sexual

minority, or because enforcement of "anti-sodomy" laws in this country to date has been erratic and, at least relative to the frequency of sexual activities violating "anti-sodomy" laws, presumptively infrequent. None of these aspects of this case should be allowed to minimize its significance. This case is of surpassing importance, not only to the millions of people directly (if not necessarily consciously[5]) affected by the outcome, but to the respect and authority of our governmental system itself and of the Constitution upon which it stands.

I. IT IS NO COINCIDENCE THAT THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY HAS BEEN DEVELOPED IN LARGE MEASURE IN CASES CONCERNING PERSONAL DECISIONS ABOUT SEX; SEXUAL MATTERS ARE INTEGRAL TO HUMAN PERSONALITY AND HUMAN RELATIONSHIPS.

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[5] It is doubtful that the average heterosexual person expects to be prosecuted and convicted for his/her private consenting adult sexual activities, whatever this Court may hold as to the power of the state to do so. By contrast, gay, lesbian and bisexual persons have considerably more reason to fear prosecution, penalties and their civil consequences, given the differential history of "anti-sodomy" law enforcement against sexual minorities. As of 1969, only fifteen years ago, only Illinois among the 50 states had decriminalized private consenting same-gender sexual contacts. Ill. Rev. Stat. c. 38, §§ 11-2, 11-3 (1961), discussed in S. Kadish & M. Paulsen, *Criminal Law and Its Processes* 9 (1st ed. 1969). While "well over half the population of the [United States] now resides in locations in which one may enjoy autonomy in one's decision-making related to one's sexual relationship," *Sexual Orientation and the Law* 11-12 (R. Achtenberg, ed. 1985), a holding by this Court that Georgia is within constitutional bounds in criminalizing "sodomy" would empower the twenty-five (25) states that have decriminalized this range of sexual behaviors to re-criminalize it, to the detriment of gay, lesbian and bisexual persons who constitute the demonstrable majority of those persons against whom such laws historically have been enforced, even if such laws theoretically encompass heterosexual as well as homosexual conduct.

A. The Right To Be Sexual In Consenting, Non-Violent And Physically Private Ways Constitutes One Essential Dimension Of Personal Privacy Of The Adult Human Being.

The right to privacy derived from the Bill of Rights has been developed by this Court in a deep if not an exceedingly long line of cases, many of which have concerned decision-making by persons and government about sexual matters.[6] *Amici* assert that it is no coincidence that those cases, like the case at bar, involve a sexual subject matter. Sex is very important to people and, generally, people associate sexual matters with privacy.[7] The cases decided by this Court concerning the constitutional development of privacy as it relates to sexual matters typify the sorts of difficult, life-altering decisions people are required to reach everyday concerning sex (e.g., methods of birth control; sterilization; choice of marital partner; pregnancy in relation to both the family and employment).

Once asked by a journalist at the turn of this century to define "mental health", Sigmund Freud is reputed to have replied: "It is to love and to work". Love is a multi-faceted human need. For most adults, at least some forms

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[6] *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); *LaFleur v. Cleveland Board of Education*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[7] See cases cited at n. 1, *supra*. Also, R. Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421 (1980); K. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980); T. Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L.Rev. 233 (1977); M. Dunlap, *Toward Recognition of "A Right To Be Sexual"*, 7 Women's Rts. L.Rptr. 245 (Spring 1982).

of love include a strong sexual element. Except for persons who have chosen celibacy, the human being's crucial psychological need to share sexual love requires some form of physical action for its fulfillment and expression. By no means are all forms of love "Platonic"[8]. Certainly judging by the wealth of literature and philosophical work devoted to sexual matters over the centuries, personal decisions about sex compose an extremely important human activity. It would not be an overstatement to rank sexual activity and the resulting self-expression as a highly important human need.[9] Not only is sexual activity neces-

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[8] Petitioner erroneously asserts that ". . . there is no validation for sodomy found in the teaching of the ancient Greek philsophers Plato or Aristotle." (Pet. Brief 20 and n.2 thereof). Although Plato's non-demonstrativeness and his view of the inappropriateness of sexual expression generally have given rise to the common understanding of a "Platonic" relationship as a non-sexual one, and although it has been said of Plato, the man, that "[o]f love between the sexes . . . he had no experience . . . nor would he have valued it highly," D. Lee, trans., Introduction to *The Republic of Plato* 46 (1974), considerable scholarship concerning Plato's milieu, attitudes and experience has defined him and his era as (at least) highly tolerant of sexual expression of love between males, in a culture persuaded of the naturalness and normalcy of homosexuality. K. Dover, *Greek Homosexuality* 12, 154 (1978). The scholars do mention that homophobia existed in ancient Greece, however, to the extent that the passive receptivity of the male in some forms of same-sex intercourse was considered womanish and therefore undesirable. Perhaps homophobia stemmed in ancient Greece and stems today in the United States in part from the fears of sexual passivity, rape, physical subjugation of the female part of the self and domination by the male that co-exist and correlate with sexism toward women. *See*, S. Brownmiller, *Against Our Will: Men, Women and Rape* 257-268 (1975). In any event, petitioner seriously misstates Greek history and classical philosophy in an avid search to find support for the categorical assertion that sexual activity between two persons of the same gender "for hundreds of years, if not thousands, has been uniformly condemned as immoral." (Pet. Brief 19).

[9] *See* generally, H. Katchadourian and D. Lunde, *Fundamentals of Human Sexuality* 2 (1972); J. McCary, *McCary's Human Sexuality* 11, 137 (1978).

sary to procreation; for an indeterminately large number of persons, voluntary sexual activity is a critical component of human happiness and personal fulfillment.

At the same time, involuntary sexual acts constitute a major form of serious crime, and sexual activity whether or not voluntary carries risks, varying in intensity from displeasure and discomfort to disease[10] and unwanted parenthood. Where violence, coercion, overreaching or involuntary public exposure are at issue, the state has been held to have power to regulate sexual behavior, and personal privacy finds boundaries in these situations.[11] How-

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[10] Counsel for *amicus* David Robinson Jr., in behalf of petitioner, argues that the phenomenon of AIDS justifies the State of Georgia in criminalizing all oral-genital and anal-genital contacts. Because AIDS appears to be caused by exchange of bodily fluids, resulting in transmission of the infecting virus to the blood stream (*see, e.g.,* J. Curran, *et al., The Epidemiology of AIDS: Current Status and Future Prospects,* 229 Science 1352-1357 (Sept. 1985)), Robinson's argument should include the position that AIDS empowers the State of Georgia to criminalize contact between penis and vagina, since it poses the likelihood of exchange of semen and vaginal fluids, not to mention blood and mucus. Logically, Robinson's position should be that the State is empowered to prevent AIDS by prohibiting all sexual activities that countenance any risk of exchanging bodily fluids, no matter what the genders of the partners. There are no known instances where AIDS has been contracted through sexual activity between women. There are 158 known cases where women have contracted AIDS through heterosexual activity. The Center for Disease Control considers lesbians at a lower risk of contracting AIDS through sexual activity than heterosexual women (Telephone interview with Chuck Fallis, Public Affairs Specialist, Public Affairs Office, Center for Disease Control, Atlanta, Ga. (Jan. 22, 1986)). Moreover, because lesbians enjoy the lowest rate of AIDS, by Robinson's hypothesis, lesbian sex ought to be the only kind that a state can permit during the pendency of the AIDS epidemic. These points underscore the utter irrationality of the Robinson hypothesis.

[11] The power of states to prevent and punish violent and coercive sexual activity is expressed in sexual assault and rape laws, for example, and is in no way disputed in the case at bar. As to

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ever, in the case at bar, respondent Hardwick was arrested in the bedroom of his own home and charged with committing an act of sodomy (Jt.App. 4); here there is no evidence of violence, coercion, overreaching, or involuntary public exposure in relation to Hardwick's sexual activity.

The homophobic argument of petitioner to the contrary notwithstanding, gay, lesbian and bisexual persons hold no monopoly on the negative side of sexual activities, either in terms of being assaultive[12] or in terms of sexually

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the matter of states' power to prevent involuntary public exposure to sexual activities, the states' authority likewise has been found to be constitutionally grounded. "Granting that society can proceed directly against the 'sexual embrace at high noon in Times Square' (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)), an appeal to such extremes should not provide the pretext for withdrawing all constitutional protection from sexual conduct whenever the participants fail to hermetically seal their actions (footnote omitted)." L. Tribe, *American Constitutional Law* 948 (1978); *see also, Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211, 215 n. 13) (1975) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72 (1976) (regulation of locations of pornographic theatres to prevent unwanted public exposure is constitutional, if drawn to meet governmental interests without undue discrimination).

[12] Petitioner argues that "[h]omosexual sodomy . . . is marked by . . . a disproportionate involvement with adolescents (footnote omitted) and . . . a possible relationship to crimes of violence." (Pet. Brief 37) These arguments are factually unsupported. To the extent petitioner seeks to implant the idea that homosexuals prey upon unconsenting youths, this position likewise is false; is based upon a notorious and unsupported stereotype. *See*, D. Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the "Issue" of Homosexuality*, 11 Golden Gate U. L. Rev. 635; D. Hitchens & B. Price, *Trial Strategy In Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 Golden Gate U. L. Rev. 451, 452-461 (1978-1979) (discussion of pervasiveness and falsity of stereotype of "lesbian mothers" as persons who "molest children, and engage in sexual activity in front of children"). If the term "disproportionate" in petitioner's argument is supposed to suggest a contrast with the degree of heterosexual involvement in coercive, non-consensual sexual acts with adolescents, again,

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transmitted diseases.[13] In this regard, the effort of petitioner and of *amicus* Robinson to use AIDS to justify failing to protect the right of privacy of homosexuals amounts to an expedient and perverse use of half-informed fears about a tragic and deadly disease to twist law around a moralistic condemnation of an entire class of human beings. In their AIDS argument, more than in any other argument they offer, petitioner and *amicus* Robinson seem to be overwhelmed by the weight of homophobia. Homophobia is a burdensome form of bigotry that has been in search of justification for centuries.[14]

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it is a false contrast; it would appear that the most common form of such coercive, non-consensual sexual acts as to minors is incest, which to date appears chiefly to be a male-adult-on-female-minor pattern. E. Press, H. Morris, R. Sondza, *An Epidemic of Incest*, 98 Newsweek 68 (11/30/81) (estimating that at least one in one hundred adult women in the United States has been sexually molested by her father); J. Herman, *Father-Daughter Incest* (1981) (projecting that when close relatives are included, one adult woman in every six in the United States has been a victim during childhood/adolescence of sexual molestation by males); K. Meiselman, *Incest* 52 (1978); J. Densen-Gerber & J. Benwad, *Incest as a Causative Factor in Anti-Social Behavior: An Exploratory Study* (1976); J. James & J. Meyereding, *Early Sexual Experience and Prostitution*, 134 American Journal of Psychology 1381-1385 (1977) (incest is responsible for the largest percentage of female teenage runaways and an even larger percentage of prostitutes). Perhaps most important, petitioner's arguments constitute a *non sequitur;* the frequency of sexual coercion and violence as to teenagers by homosexuals no more forms a proper basis for denying constitutional privacy to physically private, consenting *adult* homosexual contacts than the above-recited frequency of sexual coercion and violence as to minor females by adult heterosexual males provides a proper basis for denying constitutional privacy to physically private, consenting adult heterosexual contacts.

[13] *See* note 10 and accompanying text, *supra.*

[14] "Homophobia" was first coined by psychologist George Weinberg, author of *Society and The Healthy Homosexual* (1972), to describe an irrational fear and hatred of homosexuals and of their sexuality. T. Marotta, *The Politics of Homosexuality* 265

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This Court's decisions concerning federal constitutional privacy have firmly established that the right to privacy in the context of decision-making about a variety of sexual matters is both personal and fundamental. The case at bar cannot validly and convincingly be distinguished from those decisions by the assertion that they concern sex within marriage[15]. Nor can those cases accurately be characterized as concerning exclusively family matters.[16] Along with decisions on the subjects of marriage[17] and family life[18], the range of constitutional privacy decisions of this Court encompasses the rights of unmarried persons[19] and of minors[20] to have contraceptives, the right of a person to possess pornography in his home[21], and the fundamental nature of the right of a person to retain his procreative capacity where a state

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(1981). Such irrational repulsion can take the form of dread at being in close quarters with gay men or lesbians (Weinberg at 4-5); anxiety about being thought a homosexual; hostility towards touching between members of the same sex (eg., football players may safely pat each other on the buttocks but not walk together hand in hand, as noted in Slade, *Displaying Affection in Public*, NY Times, Dec. 17, 1984 at B14, col. 1); violent assaults against perceived homosexuals; strongly held, irrational stereotypes, such as that homosexuals are all child molesters or oversexed (reminiscent of an era, a century ago, in which the New York Times could run an article insisting that black men were prone to rape, P. Giddings, *When and Where I Enter* 92 (1984); and the conviction that homosexual men and women—by reason of sin, sociopathology or sickness—are not entitled to the full benefits of citizenship.

15 Pet. Brief 25.

16 Pet. Brief 27, 30.

17 *Griswold v. Connecticut* and *Loving v. Virginia*, cited at note 6, *supra*.

18 *Zablocki v. Redhail*, *Moore v. City of East Cleveland*, *Pierce v. Society of Sisters*, cited at note 6, *supra*.

19 *Eisenstadt v. Baird*, cited at note 6, *supra*.

20 *Carey v. Population Services International*, cited at note 6, *supra*.

21 *Stanley v. Georgia*, cited at note 6, *supra*.

law would have required sterilization of him as a member of a certain group of criminal convicts (in a decision rendered prior to an explicit holding by this Court that privacy itself is guaranteed by the Constitution[22]).

To propose that constitutionally protected privacy is not available to those of every sexual orientation whose consensual, adult, physically private sexual activities are considered unorthodox by the majority of a given state's legislators, no matter how common the activities are in fact, is circular. To propose that because they are unmarried[23], constitutionally protected privacy is unavailable to those of non-heterosexual orientation for sexual choices that preclude them from marriage, particularly when it is the state that keeps the gates of marriage and excludes gay and lesbian persons from that estate[24], is viciously circular. The effort of petitioner to undermine respondents' assertion of a right to privacy that includes the right to choose to engage in physically private, consenting oral-genital and anal-genital sexual activities between adults, by characterizing this Court's privacy decisions as protecting only married persons and their families, seriously misstates the case law. Also, it invites this Court to make the scope of federal constitutional privacy depend on and vary with the marriage and domestic relations laws of the fifty states.[25] The equal protection guarantee and the fun-

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22 *Skinner v. Oklahoma*, cited at note 6, *supra*.

23 Pet. Brief 37-39.

24 In *Baker v. Nelson*, 291 Minn. 310 (1971), *app. dismissed*, 409 U.S. 810 (1972) and in *Singer v. Hara*, 11 Wash. App. 247 (1974), the state courts held that state laws proscribing same-gender marriage are constitutional. Neither of these decisions squarely addresses the federal constitutional right to privacy in relation to these holdings.

25 Presently no state legitimates marriage between two males or two females; thus, at present no gay or lesbian marital partner

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damental nature of the right to privacy should fully deter this Court from entering upon that mistaken road.[26]

If this Court is to uphold Georgia's "anti-sodomy" law as against gay, lesbian and bisexual persons, this Court will sweep aside its own informed decisions about the nature of privacy and of the relationship between the person and government. The gist of those decisions[27] is that there is a realm of personal choice, of which sex-related choices constitute a vital part, in which the government's coercive force (and, particularly, the criminal sanction) does not belong, constitutionally speaking. That realm of personal choice is properly characterized as being enjoyed primarily by adults, with respect to intimately personal matters such as whether to bear or beget a child, whether to engage in procreative sexual activity, whether to marry a person of a different racial group, whether to possess pornography in one's home, whether to secure birth control information and contraceptives, and whether to have an abortion prior to viability of the foetus. Whether to consent to engage in physically private sexual activities of a non-injurious[28], non-violent nature with an-

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could successfully claim a federal right to privacy deriving from his/her marriage in a state authorizing such marriage. However, in that the states do retain the power to define who may marry, once any state validates same-gender marriage, the federal constitutional right to privacy would vary according to state law.

[26] *See* notes 24 and 25, *supra*.

[27] *See* cases cited at note 6, *supra*.

[28] Of course, it may be argued that some of the activities prohibited by the Georgia law can cause AIDS, veneral disease and other health hazards. However, so can genital-genital intercourse between a male and a female, as discussed in note 10, *supra*. The position that the Georgia law is based upon a need to prevent AIDS is simply unsupported by the content of the statute itself, which is overbroad (some anal-genital and some oral-genital contacts do not involve exchange of bodily fluids and

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other adult snugly and logically fits within that area of personal decision-making circumscribed by the privacy decisions of this Court.

B. Georgia's Definition Of "Sodomy" Criminalizes Sexual Conduct In Which Persons Of Every Sexual Orientation Engage; The Definition Assures Built-In Discrimination In Law Enforcement.

The Georgia law, by its terms, includes a wide array of prohibited acts under the rubric of "sodomy". *Amici* already have observed that millions of adult persons in the U.S. would be rendered criminals if the Georgia law were adopted and enforced nationwide. It also has been noted that the statute prohibits sexual activities that are less dangerous, in terms of the spread of at least some sexually transmitted diseases, than contact between penis and vagina.[29] Along with these deficiencies in this law, it must be observed that the law prohibits sexual activities that may be the only ones available to meet the fundamental needs for sexual fulfillment and communication of some groups of persons. For example, disabled persons may not have use or control of genitals for sexual purposes and may need to engage in anal-genital or oral-genital sexual activities to express and gratify themselves

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do not appear to carry high risks of transmission of AIDS and venereal disease) and underinclusive (genital-genital intercourse, which does involve exchange of bodily fluids, and which carries risks of transmission of AIDS and venereal disease) is not prohibited. The constitutional deficiencies of this type of law are well-recognized. The inadequacies of the AIDS argument to justify an "anti-sodomy" law of the type and scope here at issue also have been ably addressed by the District Court in *Baker v. Wade*, 106 F.R.D. 526 (1985), 553 F. Supp. 1121 (1982), *rev'd on other grounds*, 769 F.2d 289 (1985).

[29] *See* notes 10 and 28.

sexually.[30] Sexually dysfunctional persons may need these forms of activities as well, if they are to have any means of sexual satisfaction and expression.[31]

As written, the sweep of Georgia's "anti-sodomy" statute is unrestrained. Its terms beg for discriminatory enforcement, and its application to potentially millions of persons invites hypocrisy and arbitrariness in that enforcement process. As one criminal law scholar, Dean Sanford Kadish, observed almost two decades ago, after noting that the then-pervasive criminal laws prohibiting homosexual practices had little if any deterrent effect:

> . . . the use of the criminal law has been attended by grave consequences. Opportunities for enforcement are limited by the private and consensual character of the behavior . . . To obtain evidence, police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution (See Project, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement in Los Angeles County", 13 U.C.L.A. L.Rev. 643 (1966)).[32]

Because of the breadth and variety of sexual acts prohibited by it, the Georgia law also assures hypocrisy in enforcement, even if it ever were feasible to enforce it

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[30] *See, e.g.*, J. Brockway, *et al., Effectiveness of a Sex Education and Counseling Program for Spinal Cord Injured Patients*, 1 Sexuality and Disability 127-136 (1978) (program of rehabilitation for heterosexual persons with spinal cord injuries to learn to use oral-genital sexual techniques); J. Brockway, *et al., Sexual Enhancement in Spinal Cord Injured Patients: Behavioral Group Treatment*, 3 Sexuality and Disability 84-96 (1980). *See also* J. Lessing, Sex and Disability in J. Loulan, *Lesbian Sex* 151-158 (1984).

[31] *See generally*, H. Kaplan, *The New Sex Therapy: Active Treatment of Sexual Dysfunctions* (1974); and W. Masters and V. Johnson, *Human Sexual Inadequacy* (1970).

[32] S. Kadish, *The Crisis of Overcriminalization*, 374 The Annals of the American Academy of Political and Social Science 157, 159-162 (1967).

against all of those who violate its quite capacious terms. If the sexual activities engaged in by tens of millions of persons, including oral-genital and anal-genital contact between male-male, female-female and male-female partners, are representative of the sexual activities engaged in by police officers, judges, jurors, prosecutors and others involved in enforcing the Georgia law and like laws of other states, then there will be many occasions where a lawbreaker will arrest, prosecute, convict or sentence another lawbreaker for acts that s/he also has done. There can be no more hypocritical quality to law enforcement than this.

Feminist poet and philosopher Adrienne Rich has written of the danger of hypocrisy about sexuality, in moving terms, as follows: "Heterosexuality as an institution has also drowned in silence the erotic feelings between women. I myself lived half a lifetime in the lie of that denial. That silence makes us all, to some degree, into liars . . . The possibilities that exist between two people . . . are . . . the most interesting things in life. The liar is someone who keeps losing sight of these possibilities."[33] Where the enforcers of the law are as pervasively "guilty" of violating it as those punished by the enforcers under the law, the "lying" becomes a devastating and encompassing dishonesty that corrupts the law itself. Surely Georgia's "anti-sodomy" statute is the prototype of laws that are "unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[34]

C. Government Has Important And Legitimate Interests In Recognizing The Privacy Of Adults Who Engage In Consensual Sexual Activities In Physically Private Locations.

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[33] A. Rich, *Women and Honor: Some Notes on Lying* (5th printing, 1979).

[34] T. Arnold, *Symbols of Government* 160 (1935).

The limitation upon the power of states that will be represented by this Court's decision in favor of the individual's right to privacy as asserted by respondents Hardwick *et al.* does not undercut the power of the state to act to prohibit dangerous, irresponsible or coercive sexual activities, nor to protect persons from violence, nor to protect minors, nor to protect persons from crimes committed within sexual relationships (e.g., sexual assaults by familiars). Rather, a decision in favor of the decision-making power of Hardwick *et al.* as to whether to engage in private, consenting, non-violent sexual activities with others of the same or different sexes places responsibility precisely where it belongs and is most manageable—upon the shoulders of the person making the decision, affected by the decision, and living with the consequences of the decision. "*Responsibility is the great developer of men.*"[35]

A decision that places the responsibility on the individual involved removes government from the position of moral arbiter in this complex arena of human behavior. "Any 'higher law' philosophy implies a hierarchy of values"[36], and for this Court to determine that the state is in a better position than its citizens to say what types of non-harmful sex are appropriate and good lofts governmental power over the conscience and moral judgment of the individual. The government is placed in a position of being "better" than its citizens. This is particularly anomalous in a system in which the government is supposed to be its citizens, including minorities. The central argument of the Attorney General of Georgia is that all

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[35] *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 92 (1936) (Brandeis, J., concurring) (emphasis added).

[36] W. Friedman, *Legal Theory* 143 (5th ed., 1970).

persons who engage in "sodomy" as Georgia defines it are immoral and it is that immorality that empowers the state to prohibit "sodomy". If this Court were to accept that argument, it would be passing judgment upon the lives and behaviors of millions of human beings. It also would be deciding that the state has a right to punish its citizens for physically private consenting adult sexual activities, thus diminishing the citizens' capacities for responsible individual judgment in the area of consenting adult sexual behavior.

Such a position by this Court would invite not simply discriminatory, homophobic and arbitrary law enforcement, and not simply hypocrisy behind that process. The end result would be dependence and weakness of the individual relative to the government. The individual would have been deemed less capable than the state of managing her/his own most intimate, personal decisions. If it is true that people have a way of living up or down to the expectations of those who govern them, then a decision by this Court that arrogates to the state the power to make intimate sexual choices for individuals assuredly invites people to live down to this Court's unfavorable image of the capabilities of the individual. As discussed here and in the section that follows, the policy considerations accompanying the substantive issue presented by the case at bar cut decidedly in favor of the vindication of the privacy model to place freedom and responsibility for decisions by adults about physically private, consenting sexual behavior upon the individual.

II. IF THIS COURT LIMITS CONSTITUTIONALLY PROTECTED PRIVACY AS URGED BY PETITIONER, IT WILL BE LENDING ITS UNPARALLED AUTHORITY TO RAMPANT

DE JURE AND DE FACTO DISCRIMINATION AGAINST A MINORITY GROUP, FOR NO GOOD REASON.

Throughout the United States, anti-gay violence and anti-gay bigotry are posing real and ongoing problems for lesbians, gay men and for those who are concerned with fair treatment of all minority groups.[37] At the same time, discrimination against gay men and lesbians in employment[38], domestic relations[39], public accommodations[40], and other vital realms of human existence[41] are the subjects of myriad legal challenges, with varying results. In this milieu, a determination by this Court that states are free to criminalize gay/lesbian sexual activities *per se* would reinforce the homophonic elements of both anti-gay

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[37] It has been reported that one (1) of five (5) gay males and one (1) of ten (10) lesbians surveyed in eight (8) cities in the United States have been punched, kicked, hit or beaten because they are gay/lesbian. National Gay Task Force (in cooperation with gay and lesbian organizations in eight U.S. cities), "Anti-Gay/Lesbian Victimization: A Study" (New York: June 1984) (unpublished).

[38] *See, e.g., Rowland v. Mad River School District*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1373 (1985); *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981); *Aumiller v. University of Delaware*, 434 F.Supp. 1273 (D.Del. 1977); *Gay Law Students v. Pacific Telephone & Telegraph Co.*, 24 C.3d 458 (1979); *Gaylord v. Tacoma School District*, 88 Wash. 2d 286 (1977), *cert. denied*, 434 U.S. 879 (1977); *see generally, Sexual Orientation and the Law* at Chapter 5, pp. 5-1 through 5-71, cited at note 5, *supra*.

[39] *See generally, Sexual Orientation and The Law*, Chps. 1 & 2, pp. 1-3 through 2-58, cited at note 5, *supra*.

[40] *See, e.g., Hubert v. Williams*, 133 Cal.App.3d Supp. 1 (1982) (denial of housing to disabled person and his lesbian attendant was violation of California's public accomodations law); *see generally, Sexual Orientation and the Law* at Chap. 8, pp. 8-3 to 8-20, cited at note 5, *supra*.

[41] *See generally, Sexual Orientation and the Law*, Chaps. 3 (taxes), 4 (death, incapacity and illness), 6 (military and veterans), 7 (immigration), 9 (First Amendment), cited at note 5, *supra*.

violence and the anti-gay legal decisions that are proliferating at the present time. Criminalization of gay/lesbian sexual activities excuses and encourages already pervasive civil discriminations against these groups of persons. If this Court were to uphold Georgia's power to make criminals of Hardwick *et al.*, this Court would be lending its unparalleled leadership to the position that it is acceptable to hate those who are gay and lesbian, and even to prosecute and punish those unfortunate enough (as respondent Hardwick was) to have their entirely unobtrusive and non-public sexual activities come to the attention of criminal law authorities.

At present, "[t]he presence of the criminal penalty in a state casts a shadow over other areas (eg., custody, immigration, and licensing) and contributes to the patchwork of results".[42] If this Court were to lend its imprimatur to the position that all sexually active gay, lesbian and bisexual persons may be treated as criminals *per se*, that shadow would lengthen and deepen to cover practices of anti-gay discrimination and violence of unmeasured proportions. While decriminalization hardly would render any of these other types of suffering by gay and lesbian persons *necessarily* less likely[43], the denial of any right of privacy to gay and lesbian persons represents an approval, howsoever tacit and sublimated, of all of these re-

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[42] R. Rivera, *Queer Law: Sexual Orientation Law In The Mid-Eighties, Part I*, 10 U. Dayton L.Rev. 459, 540 (Spring 1985).

[43] The experience of England after passage of an act decriminalizing homosexual conduct is instructive in this regard. "The Act did not legalize homosexuality; it merely removed criminal penalties from a fairly narrow range of homosexual activities . . . [continuing to permit a wide array of criminal prosecutions of gay persons] . . . [t]he 1967 Act has not secured for homosexual men and women a rightful and equal place in society. It was not intended to." P. Hewitt, *The Abuse of Power: Civil*

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lated forms of discrimination and violence. In this era of severe homophobic reactions, fanned by the fear of AIDS, this message from this Court would be quite likely to prove nothing short of devastating to the struggle for a measure of decency and fairness in treatment afforded to gay, lesbian and bisexual persons by neighbors, employers and others including government. Criminalization translates readily into permission to discriminate, to malign, to stigmatize and to multiply the harms already suffered by gay and lesbian persons in this culture, society and legal system.[44]

There is an interesting debate about whether being gay/lesbian is a matter of genes, of compulsion, of par-

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Liberties in The United Kingdom 221 (1982). The author of this study on the state of civil liberties in the United Kingdom concludes that "[i]n order to guarantee homosexual men and women their right to equality of treatment, the law on homosexual offenses should be placed on the same basis as the law relating to heterosexual offenses . . . Far from protecting society, the [current] law demeans both its victims and those who enforce it. P. 227. In England, unlike the United States, there is no federally protected constitutional right to privacy for anyone.

[44] Formidable examples of the high price of criminalization of homosexuality *per se* include: cases upholding denials of child custody based in part on the criminalization of homosexuality, *see, e.g., L. v. D.*, 630 S.W.2d 240 (1982); *N.K.M. v. L.E.M.*, 606 S.W. 2d 179 (1980); *Roe v. Roe*, 228 Va. 722 (1985); cases upholding dismissals from public employment of persons based upon criminal law convictions for same-gender sexual relations, *see, e.g., Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904, *cert. dismissed by agreement of parties*, 379 U.S. 951 (1964); *McLaughlin v. Board of Medical Examiners*, 35 Cal.App.3d 1010 (1973); cases in which courts have proposed to limit freedoms of speech and association based upon the existence of state sodomy proscriptions, *see, e.g., Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Gay Activists Alliance v. Lomenzo*, 66 Misc.2d 456, 320 N.Y.S.2d 994 (1971), *reversed sub nom., Owles v. Lomenzo*, 38 App.Div.2d 981, 329 N.Y.S.2d 181 (1972) *aff'd.*, 31 N.Y.2d 965 (1973).

enting or of personal choice. One commentator summarizes it as follows:

> Homosexual activity is sometimes explained as "compulsive activity", that is, acts which are beyond free choice. Others claim that it is the outcome of a deliberate choice motivated by curiosity, opportunity, or caring for another person of the same sex. Some say that physiological factors, such as sex hormone levels, are at the root of homosexuality. Still others claim that homosexuality begins in the home . . .[45]

Perhaps unfortunately, resolution of that interesting debate would be of little help to this Court in deciding this case. If homosexuality is controlled by factors outside personal volition, then to punish gay/lesbian sex *per se* is to criminalize a status over which the person does not have control. Such status-based criminalization has been recognized as unfair by this Court in the contexts of drug addiction and alcoholism.[46] Even this legally protective

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[45] R. Slovenko, Foreward, *The Homosexual and Society: A Historical Perspective*, 10 U. Dayton L.Rev. 456 (Spring 1985).

[46] *Robinson v. California*, 370 U.S. 660, 667 (1962) (criminal offense of "addiction to narcotics" held to violate Eighth and Fourteenth Amendments' guarantee of freedom of the person from cruel or unusual punishment, stating "[drug addiction] . . . is apparently an illness which may be contracted innocently or involuntarily"); *but see, Powell v. Texas*, 392 U.S. 514, 517 (1968) (state law punishing a person who shall "get drunk or be found in a state of intoxication in any public place" held not to violate Eighth and Fourteenth Amendments as cruel or unusual punishment, because of the distinct problems associated with public drunkenness); and *see, Perkins v. North Carolina*, 234 F.Supp. 333 (W.D.N.C. 1964) (upholding five-to-sixty year sentence for homosexual conduct, making distinction between status and acts of the homosexual). If the homosexual is as helpless to prevent himself from engaging in sex with another of the same gender as an alcoholic or drug addict is to keep from consuming the addictive substance, then *Perkins* was wrongly decided and this Court should dispose of cases involving criminal penalties for homosexuality in the same way as it disposed of cases penalizing drug addiction and alcoholism; where there is not independent

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analogy disfavors lesbians and gay men, in policy terms, in that, unlike drug addiction and alcoholism, homosexuality is not a disease, defect or sexual deviation, medically and psychologically speaking.[47] Assuming *arguendo* that homosexuality is chosen, to punish its adherents and practitioners is comparable to punishing the adherents and practitioners of an unpopular religious faith. Such punishment strikes a strong blow to the historical heart of the U.S. Constitution and Bill of Rights.[48] In sum, the

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basis for criminalization, as there was found to be in *Powell v. Texas* in the fact that public drunkenness posed special law enforcement difficulties, the punishment of a person for a condition or status that she/he is helpless to avert is cruel and unusual, and denies equal protection *vis a vis* heterosexuals.

[47] As of 1973, the American Psychiatric Association determined that homosexuality is neither a mental illness nor a form of sexual deviation. *See* American Psychiatric Association *D.S.M. III: Diagnostic and Statistical Manual of Mental Disorders* 281-82, 380 (3d ed. 1980). See discussion of these changes in *Hill v. Immigration and Naturalization Service*, 714 F.2d 1470, 1472 and n. 3 thereof (9th Cir. 1983) ("[A]ccording to 'current and generally accepted canons of medical practice,' homosexuality *per se* is no longer considered to be a mental disorder" (footnote omitted)). Further, it is important to not that there is no such thing as a homosexual personality or character structure. The diversity within the homosexual community is as great as within the heterosexual community. Benedek, P., M.D. and Schetky, D., M.D., eds., *Emerging Issues in Child Psychiatry and the Law*, Chapter on "Lesbian Mothers/Gay Fathers" by Kirkpatrick, M., M.D. and Hitchens, D. J., J.D. Moreover, there is no evidence that homosexuals as a group are more neurotic, unhappy, or psychologically maladjusted than heterosexuals matched for living similar lives. *See* Bell, A. & Weinberg, M. *Homosexualities: A Study of Diversity Among Men and Women*, (1978).

[48] Historian J. R. Pole aptly has summarized the development of religious freedoms under the U.S. Constitution as follows: "The concept of equality of conscience, which began as a claim for equal treatment between warring sects thus ends by forming a perfect unity with the political equality of individuals. Whatever an individual's heritage, convictons or assocations, the government's only legitimate knowledge of him or her is as the sovereign possessor of autonomous moral being." J. R. Pole, *The Pursuit of Equality In American History* 111 (1978).

constitutional right to privacy no more can be denied to gay and lesbian persons based on the ascription of their status than it can be withheld on the basis that gay persons choose to be gay. In this regard, it should be noted that some of the situations involving exercises of privacy held protected by this Court may be said to concern ascribed statuses beyond the person's control (e.g. minority[49] and fertility[50]), while others may be said to concern statuses or situations chosen by the person claiming the protection of constitutional privacy (eg. criminal conviction[51], interest in prurient literature[52], and unmarried status[53]). Plainly, whether homosexuality is dictated by external forces or chosen by the person, (or both), cannot determine whether privacy should be afforded to the homosexual person.

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CONCLUSION

There are those who would contend that this Court need neither hear nor give reasons in order to uphold the prerogative of Georgia to criminally proscribe practices that have been the subject of proscription and penalties in various cultures for centuries. Their argument, that reason need not govern the process of this Court in deciding this case, has already been made by no less a champion of the criminalization of homosexuality than Lord Patrick Devlin, to whom H.L.A. Hart's definitive response deserves to be read in its entirety.[54] The most telling pas-

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[49] *Carey* v. *Population Services International*, cited at note 6, *supra*.

[50] *Roe* v. *Wade*, *Griswold* v. *Connecticut* and *Eisenstadt* v. *Baird*, cited at note 6, *supra*.

[51] *Skinner* v. *Oklahoma*, cited at note 6, *supra*.

[52] *Stanley* v. *Georgia*, cited at note 6, *supra*.

[53] *Eisenstadt* v. *Baird*, cited at note 6, *supra*.

[54] H.L.A. Hart, *Immorality and Treason*, 62 Listener 162-163 (July 30, 1959), reprinted in S. Kadish & M. Paulsen, *Criminal Law and Its Processes* 18 (1st ed. 1969).

sage of Hart's response, in terms of the position that this Court need only act upon a gut response of moral repugnance toward homosexuality in order to strike down the assertion of a claim of privacy by respondents Hardwick *et al.*, is as follows:

> When Sir Patrick [Devlin's] lecture was first delivered The Times greeted it with these words: "There is a moving welcome humility in the conception that society should not be asked to give its reason for refusing to tolerate what in its heart it feels intolerable." This drew from a correspondent in Cambridge the retort: "I am afraid that we are less humble than we used to be. We once burnt old women because, without giving our reasons, we felt in our hearts that witchcraft was intolerable."
>
> This retore is a bitter one, yet its bitterness is salutary. We are not, I suppose, likely, in England, to take again to the burning of old women for witchcraft or to punishing people for associating with those of a different race or colour, or to punishing people again for adultery. Yet if these things were viewed with intolerance, indignation and disgust, as the second of them still is in some countries, it seems that on Sir Patrick's principles no rational criticism could be opposed to the claim that they should be punished by law. We could only pray, in his words, that the limits of tolerance might shift.[55]

In a government in which this Court must be the source of ultimate illumination of the guarantees of the U.S. Constitution, the responsibilities of this Court must sometimes seem onerous beyond description. More than once this Court has had to undo *de jure* discrimination enforced by prior decisions of this Court.[56] That represents

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[55] *Id.*

[56] Perhaps the most powerful example of this process is the matter of racial segregation, where this Court's decision of *Plessy v. Ferguson*, 163 U.S. 537 (1896), announcing "separate but equal"

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an extremely delicate process, in that the undoing, if done incautiously or callously, can undo the respect and authority of the Court itself in the process. Blessedly, in this case, this Court has ample information by which to be guided away from the course of ratification of ignorant bigotory that was taken in decision such as *Bradwell v. State*, *Plessy v. Ferguson* and *Korematsu v. United States*.[57] If this Court can see its way clear to uphold th fundamental right to privacy of persons including gay men,

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and holding it constitutional, took decades of hard labor including the work of this Court itself to undo, and still requires effort by this Court and the people of this country to undo. R. Kluger, *Simple Justice*, *passim* (1977). Likewise, the ratification of *de jure* discrimination against women based upon "natural law" inferiority of the female, in the case of *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873), has left a legacy and heritage of discrimination that this Court has been busy repairing since at least *Reed v. Reed*, 404 U.S. 71 (1971). The forcible internment of Japanese-Americans during World War II, upheld by this Court in *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943) (curfew upheld) is currently the subject of legal efforts at repair, *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). As to this example of a Supreme Court decision leading to discrimination the harm of which the courts, decades later, have been called upon and have determined it necessary to repair, the most memorable statement perhaps is that of the late Justice Earl Warren, who has written in his memoirs, ". . . I testified for a proposal which was not to intern in concentration camps *all* Japanese, but to require them to move from what was designated as the theater of operations, extending seven hundred and fifty miles inland from the Pacific Ocean. Those who did not move were to be confined to concentration camps established by the United States Government . . . I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. It was wrong to react so impulsively without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. . ." *The Memoirs of Chief Justice Earl Warren* 148-149 (1977) (emphasis in original).

[57] *See* citations at note 56, *supra*.

lesbians and bisexual persons to make decisions about private, consenting adult sexual activity, at this stage in our constitutional and legal progress, there will not need to be the extreme extent of agonizing and delicate undoing of rampant *de jure* discrimination and mistreatment, as to these sexual minorities, that has had to be and that continues to have to be done, by this Court and by this nation, as to women and people of color.

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